31-391 A

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~991~~. 619 ~~318~~ 57

EDWARD C. MARSHALL AND ROBERT CHAPIN, ADMINISTRATORS OF EDWARD G. MARSHALL, DECEASED, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 30, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 991.

EDWARD C. MARSHALL AND ROBERT CHAPIN, ADMINISTRATORS OF EDWARD G. MARSHALL, DECEASED, APPELLANTS,

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APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Petition. Filed Aug.* 10, '82.

U. S. Court of Claims.

ELISHA G. MARSHALL, Plaintiff,
vs.
THE UNITED STATES, Def'ts. } No. 12984.

To the Court of Claims aforesaid:

The plaintiff states that he is a citizen of the United States, and that he resides in the county of Carbon, in the State of Pennsylvania.

He further states that he is an officer of the United States army, being on the retired list thereof, with the rank of colonel and brigadier general by brevet; that he entered the military service of the United States as a cadet on the first day of July, 1845; that he was appointed second lieutenant by brevet and assigned to the fourth infantry in said army on the first day of July, 1850, and that his subsequent military history is as follows: Second lieutenant sixth infantry, May 15th, 1851; first lieutenant, March 26th, 1855; captain, May 14th, 1861; colonel 13th N. Y. volunteers, April 20th, 1862; major by brevet, June 27th, 1862, for gallantry at the battle of Gaines' Mill, Va.; lieut. colonel by brevet, Dec. 13th, 1862, for gallantry at the battle of Fredericksburg, Va.; brigadier general volunteers by brevet, Dec. 13, 1862, for gallantry at the battle of Fredericksburg, Va.; colonel 14th New York artillery, January 4, 1864; colonel by
2 brevet, July 30th, 1864, for gallantry in the action which succeeded the explosion of the Petersburgh mine; brigadier general by brevet, March 13, 1865, for gallant and meritorious service during the war; major general volunteers by brevet, March 13, 1865, for gallant and meritorious service during the war; major fifth infantry, June 12th, 1865; mustered out of volunteer service, August 26, 1865; retired on the rank of colonel, September 11th, 1867, for wounds received in battle.

He alleges that "the pay of his grade, as provided by law," is twenty-six hundred and twenty-five dollars, and that he is entitled to forty per cent. on that sum for length of service, and has been so entitled since July 1, 1870, but that the defendants have denied him such pay for length of service to the extent of three hundred dollars per year; and that the amount so wrongfully withheld from July 1, 1870, to August 1, 1882, amounts to thirty-six hundred and twenty-five dollars.

There has been no action on this claim by Congress or any executive department of the Government, except the denial of payment as aforesaid.

There has been no transfer or assignment of this claim, or any part thereof, or interest therein, and your petitioner is the sole owner of the same, and is justly entitled, as he believes, to the said sum of thirty-six hundred and twenty-five dollars.

Petitioner has at all times borne true allegiance to the Government of the United States, and he has not at any time or in any

way aided, abetted, or given encouragement to rebellion against the United States. He demands judgment against the United States for the sum last named.

R. B. WARDEN.

Plaintiff's address is Lehigh Gap, Pennsylvania.

3 DISTRICT OF COLUMBIA, *ss:*

ROBERT B. WARDEN, being duly sworn, says that he is attorney-in-fact as well as attorney-at-law of the claimant in this action, and that he believes the facts in the foregoing petition stated to be true.

R. B. WARDEN.

Sworn to by the said Warden, and by him signed in my presence this tenth day of August, A. D. 1882.

[SEAL.] N. CALLAN,
Notary Public.

4 In the Court of Claims of the United States. December Term, A. D. 1881.

ELISHA G. MARSHALL
vs.
THE UNITED STATES } No. 12984.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney General.

5 EDWARD C. MARSHALL and ROBERT CHAPIN, Administrators,
v.
THE UNITED STATES.

Findings of Fact.

This case having been heard before the Court of Claims, the Court upon the evidence finds the facts to be as follows:

I.

Elisha G. Marshall entered the military service of the United States as a cadet the first day July, 1845; he was appointed a second

lieutenant by brevet the first day of July, 1850; after passing through various grades in the regular and volunteer service of the United States Army and receiving brevet ranks for gallantry in the service he was placed on the retired list of the army September 11, 1867, with the rank of colonel.

II.

He served as a cadet from July 1, 1845, to July 1, 1850; he served in the active service of the army from July 1, 1850, to September 11, 1867, and served continuously on the retired list of the army from the latter date to April 11, 1882.

III.

Since July 15, 1870, the claimant received $3,375 per annum as pay, of which amount $2,625 was grade pay, and $750 was for increase pay or percentage for length of service.

IV.

Since beginning this action Elisha G. Marshall has died and Edward C. Marshall and Robert Chapin, now the claimants herein, are the duly appointed administrators of his estate.

Conclusion of Law.

Upon the foregoing findings of fact the Court decides as conclusion of law that the petition be dismissed.

Opinion.

Davis, J., delivered the opinion of the Court:

Colonel Marshall, after graduating from West Point, served continuously in the army of the United States, being at different
6 times promoted, until September 11, 1867, when he was retired with the rank of colonel on account of wounds received in battle. It is contended on behalf of his estate, he having died after this action was begun, that since July 1, 1870, he has been entitled to receive each year as pay 75 per centum of a colonel's pay increased by 40 per centum thereof, whereas the Government has in fact paid him 75 per centum of $4,500, the maximum pay of a colonel, and it is urged that the true mode of determining the compensation of a retired officer is to first ascertain his grade pay, then to allow him 75 per centum of that pay, adding the longevity increase for each term of five years' service.

This contention has already been twice decided adversely to the claimants (Roberts *v.* The United States, 10 C. Cls., 283; Tyler *v.* The United States, 16 C. Cls., 236.) In the Tyler case the Court said: "We held then (in the Roberts case), as we now hold, that the pay of a retired officer is to be determined by first ascertaining what would have been his pay had he not been retired, and then allowing him 75 per cent. of that sum."

The limitation of a colonel's maximum pay to $4,500 (sec. 1267, R. S.) limits the full pay upon which, when retired, his 75 per centum allowance is to be computed. In view of these decisions it is unnecessary to discuss this case more fully.

The petition will be dismissed.

7 In the Court of Claims.

EDWARD C. MARSHALL & ROBERT CHAPIN, Adm'r's,
vs.
THE UNITED STATES. } 12984.

At a Court of Claims held in the city of Washington on the first of June, A. D. 1885, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the claimant's petition be dismissed.

8 In the Court of Claims of the United States.

EDWARD C. MARSHALL and ROBERT CHAPIN, Administrators of the Estate of Elisha G. Marshall, Deceased,
v.
THE UNITED STATES. } 12984.

The claimants, by Robert B. Warden, their attorney, respectfully apply for an appeal to the Supreme Court of the United States from the judgment of this Court rendered June 1st, 1885, and that the amount involved exceeds three thousand dollars.

ROBERT B. WARDEN,
Attorney for Claimant.

Washington, July 21, 1885.

Allowed July 25, 1885.

WILLIAM A. RICHARDSON,
Chief Justice.

9 In the Court of Claims.

EDWARD C. MARSHALL & ROBERT CHAPIN, Administrators of E. G. Marshall, Deceased,
vs.
THE UNITED STATES. } No. 12984.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and the conclusion of law thereon, and of the judgment of the Court, and the application of the claimants for the allowance of an appeal to the Supreme Court, and of the allowance of the same by Chief Justice Richardson.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this — day of September, 1885.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 991. Edward C. Marshall and Robert Chapin, administrators of Edward G. Marshall, dec'd, appellants, *vs.* The United States. Filed September 30, 1885.

Office Supreme Court U. S.
FILED.
JAN 19 1886
JAMES H. McKENNEY,

Supreme Court of the United States.

October Term, 1885.

EDWARD C. MARSHALL and ROBERT CHAPIN, Administrators of ELISHA G. MARSHALL, Deceased, Appellants,
vs.
THE UNITED STATES.

No. 991.

APPEALED FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

R. B. & C. G. WARDEN,
Counsellors for Appellants.

Beresford, Printer,
Washington.

Supreme Court of the United States.

OCTOBER TERM, 1885.

EDWARD C. MARSHALL *and* ROBERT CHAPIN, *Administrators of* ELISHA G. MARSHALL, *Deceased*, *Appellants*,
vs.
THE UNITED STATES, *Appellees.*
No. 911.

APPEALED FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

The appellants are the administrators of the late General Elisha G. Marshall, who entered the military service of the United States on the 1st day of July, 1845, as a cadet, and was commissioned a brevet second lieutenant on July 1, 1850. He served continuously as a commissioned officer until April 11, 1882, and was at different times promoted and received brevet ranks for distinguished service and gallantry in the war of the rebellion. He was retired with the rank of colonel, on account of wounds received in battle, on September 11, 1867.

General Marshall brought suit in the United States Court

of Claims for the full forty per cent. increase on his grade pay, and pending the prosecution of the suit he died. His administrators were then made parties and carried on the suit, and upon the judgment of the Court of Claims against them have appealed the case to the Supreme Court.

Brief.

The decision of the Court of Claims in this case was a mere reaffirmation of the grounds held by the Court of Claims in the case of Roberts *vs.* the United States, (C. C. 10, p. 283.)

In the Roberts case the Court of Claims held that the pay of a retired officer is to be determined by first ascertaining what would have been his pay had he not been retired, and then allow him seventy-five per centum of that sum, and that the section which limited the pay of a lieutenant colonel to $4,000 was a limitation upon the amount of the full pay of a lieutenant colonel upon the retired list, upon the assumption that there is a provision in the law under which a retired officer can only receive seventy-five per cent. of the *full pay* of an active officer of the same rank. This erroneous assumption arises solely and absolutely from the fact that section 1274, R. S., allows retired officers seventy-five per cent. of the pay of the *rank* or *grade* upon which they are retired, and it is the misconception of the provisions of this section which the representatives of General Marshall are concerned in having corrected.

In deciding the Tyler case Mr. Chief Justice Richardson took the same unguarded position.

By § 1261, R. S., the grade pay of a colonel on the active list is fixed at $3,500 a year.

Sect. 1267, R. S., provides that the pay of a colonel "shall not exceed four thousand five hundred dollars a year."

Sect. 1274, R. S., provides that "officers retired from the active service shall receive seventy-five per centum of the pay of the rank upon which they are retired."

Sect. 1262, R. S., provides that "there shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains or others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service."

Sect. 1263 provides that the total amount of such increase for length of service shall in no case exceed forty per centum of their current yearly pay for the grade prescribed by law.

In the case of the United States *vs.* Tyler (U. S. S. C. R. 105, p. 244) the Supreme Court held that retired officers of the army are entitled to the percentage increase pay provided for commissioned officers of the army by section 1262, R. S.

It must appear upon reading these laws and the decision referred to—

First. That the *grade* pay of a colonel on the active list is three thousand five hundred dollars a year.

Second. That his *pay, grade and increase* shall not exceed four thousand five hundred dollars a year.

Third. That a colonel upon being retired should receive seventy-five per centum of the *grade pay* of a colonel on the active list, or the sum of two thousand six hundred and twenty-five dollars per year.

Fourth. That such sum should be increased by adding thereto the increase pay allowed by section 1262 for every five years' service.

It would be evident from these facts that a colonel upon the retired list, whose term of service had extended over the period of twenty years at the date of the passage of the Act of July 15, 1870, was entitled to receive from the date of the passage of the act seventy-five per centum of the grade pay of a colonel on the active list, increased by the sum of forty per centum, and no more.

On July 15, 1870, Colonel Marshall had served over twenty-five years, and was then a colonel upon the retired

list, yet he has never received full forty per cent. increase upon his reduced grade pay.

Upon the erroneous conception that section 1274, R. S., related to the *full pay* instead of the *grade pay* of retired officers, the fact that section 1267, R. S., limited the full pay, grade and increase of a colonel on the active list to four thousand five hundred dollars per annum was taken by the accounting authorities and the Court of Claims as the reason for denying a colonel on the retired list full forty per cent. increase upon his reduced grade pay.

The superstructure of this proposition is good, but it lacks the essential support of a foundation. There is nothing to build it on. Assuredly, if there was a law under which a retired officer could receive only seventy-five per cent. of the *full pay* of an active officer of the same rank, it would undoubtedly follow that a retired colonel could receive only seventy-five per cent. of the *full pay* of a colonel on the active list, and that the limitation placed upon the *full pay* of the colonel would operate to limit the full pay of a retired colonel. But there is no such law contained in the statutes. The grossly misunderstood and misapplied provisions of Sec. 1274, R. S., and the unwarrantable practice of the accounting officers themselves, is all they have to sanction their present position.

The rule given in the Tyler case (U. S. S. C. R. 105, p. 244) is in direct conflict with this position. There it is clearly shown that in addition to the per centum of the pay of the *rank* on which retirement is made an officer is entitled to the ten per centum allowed by law for each term of five years' service.

As we have said, the principal ground upon which the full forty per cent. increase pay allowed by section 1262, R. S., has been refused, is section 1267, R. S., which provides that the pay of a colonel "shall not exceed four thousand five hundred dollars" a year. And then, in attempting to support their position, they assume the equally untenable ground, upon section 1274, R. S., which provides that "offi-

cers retired from the active service shall receive seventy-five per cent. of the pay of the *rank* upon which they are retired," by giving to that section a curtailing effect, as though it were a limitary clause, and as though it provided that the officer was to receive but seventy-five per cent. of the *current or full* pay he was receiving when he was retired. This ground is utterly destitute of reason. This section most clearly applies to the pay of the *rank or grade*, and not to the *current or full* pay an officer is receiving at the time of his retirement. It reads, "Officers retired from the active service shall receive seventy-five per centum of the pay of the *rank* upon which they are retired." Is it possible to make its meaning clearer than its own language makes that meaning? The wording of the statute is too clear and distinct to admit of any such construction as that advanced by the accounting officers and the Court of Claims.

As section 1274 applies simply to rank or grade pay, those denying General Marshall's claim have less reason, if possible, for holding their first ground than there is for holding their second proposition. There they maintain that because section 1267, R. S., places a limit upon the full pay of a colonel at four thousand five hundred dollars a year, consequently a limit is thereby imposed upon the pay of a retired colonel, although the limit prescribed by the statute is never reached by the retired colonel. Is not this at least curious reasoning? Upon the natural construction of a clearly defined statutory provision like this it certainly seems to us beyond doubt that Congress, when it enacted this section, meant solely to provide that a colonel was not to receive more than four thousand five hundred dollars per annum, and did not mean, as it certainly did not say that it meant, to affect any other pay than that particular pay which might otherwise exceed the limit imposed.

The whole groundwork of the argument for the Government resting solely on the two propositions stated, namely, that section 1274 is to be considered as providing that a retired officer is to receive when retired just three-fourths of

the full pay, rank and increase he was receiving as an active officer, whatever that pay might be, and that a retired colonel's highest pay could not exceed three-fourths of a colonel's highest pay, falls to pieces before the simple, terse and unstrained language of section 1274 itself. That section simply fixes a basis pay, a point at which retired officers are to commence from in computing their pay. It gives them three-fourths of the pay of their *grade* on the active list, and no more. It is absolutely certain in its operation. If the officer retired is a captain it gives him three-fourths of the *grade pay* of a captain on the active list; or if a major, three-fourths of the *grade pay* of a major on the active list, and so on. In conjunction with section 1261, which fixes the *grade pay* of the active officer, section 1274 fixes the *grade pay* of a retired officer, and these two sections relate to no pay whatever except *grade pay*. *The retired officer, like the active officer, must look to section* 1262 *for his service or increase pay.*

Here we maintain that the true mode of determining the pay of a retired officer is, first, to ascertain his grade pay, which upon retirement is, under the operation of section 1274 in conjunction with 1261, three-fourths of the *grade* pay of an active officer of the same rank, and upon this *reduced grade* pay add the *percentage increase pay* allowed by section 1262 for every term of five years' service. The only laws limiting the pay of retired officers of the army are sections 1274 and 1263. The first reduces and fixes their grade pay, and the second stops the counting of longevity or service pay at forty per cent. Under the operations of these two sections of the act of July 15, 1870, the limit of four thousand five hundred dollars can never be reached by a retired colonel. Why, then, if a limit placed upon the increase of longevity pay of a colonel cannot be reached by a retired colonel should that limit be pleaded to deny the accumulation of longevity increase pay of a retired colonel already reduced one-fourth? And how can section 1274, so clearly prescribing a *grade* or *basis* pay, be held to regulate service or cumulative pay, except in so far as it designates

the amount upon which such service or increase pay is to be added? Assuredly upon the recognized rules of statutory construction known to this court, no such position as that here denied can be successfully maintained. This court said in the Tyler case, (U. S. S. C. R., 105, p. 244,) speaking of retired officers:

"And if because they are not required to do full service thereafter, their compensation was reduced by the statute twenty-five per cent., that is no reason why the accounting officers should add a further limitation of pay not found in any statute." Why, then, is there in this case—one where the officers interested are notoriously entitled to the highest consideration that can be bestowed—so singular a disposition to work out a limitation where the statutes have imposed none?

Section 1274 provides that "officers retired from the active service shall receive *seventy-five per centum of the pay of the rank upon which they are retired.*"

The words grade and rank being regarded as synonymous by this Court, so far as they apply to the pay of the army, we maintain that the section just quoted provides only seventy-five per centum of the *rank* or *grade* pay, and not seventy-five per centum of the *current* or *full pay* an officer is receiving at the time of retirement; and further, that there is no intention in this section to provide increase of service pay.

It provides simply one of the two kinds of pay that army officers, active and retired, are entitled to. It is the *grade* or *basis* pay. The other pay is longevity or service pay, and one is as distinct from the other as day is from night. Section 1262 provides such increase pay, and no other section provides longevity or service increase pay to officers of the army.

Under Section 1274 a colonel upon being retired should receive seventy-five per centum of the pay of his *rank* or *grade* on the active list, and then in addition thereto, such longevity increase pay as his length of service shall entitle

him to under section 1262, irrespective of what his *current pay* might have been had he remained on the active list.

To illustrate what we submit to be the true mode of calculation we append the following table:

Retired colonel's grade pay, ...	$2,625 00
" " pay after five years' service,	2,887 50
" " " " ten " "	3,176 25
" " " " fifteen " "	3,493 87
" " " " twenty " "	3,675 00

The increase is brought to a stand at $3,675.00 by Section 1263, which provides that the total amount of longevity increase pay shall not exceed forty per cent. of the pay of the grade.

From the first the position taken by the accounting officers in regard to the pay of the army has been one distinguished by narrowness and arbitrary denial of what the laws have entitled it to. Never have the accounting officers lost an opportunity to deny or obstruct where they could do so. They originally denied that a retired officer could receive more than seventy-five per cent. of the pay he was receiving when retired, and held that afrer retirement all further increase of pay ceased. This erroneous and long maintained holding of the accounting officers created the widespread impression that the retired officer was actually only entitled to what they, the accounting officers, allowed, and it was not until they were driven from this position by this Court that the law, as it actually is, was recognized. So also in the same case as to the manner of computing longevity pay, they had to be forced by the highest existing authority to comply with the requirements of the law.

It has been suggested by persons interested that the following reasons are sufficient to convince one that the position taken by the administrators of Marshall in this case are true and sufficient:

"These plaintiffs claim—

"*First.* That as General Marshall was never credited with cadet service for longevity rations, they are now entitled to such credit. (Morton's case.)

"*Second.* That the percentage increase under the act of 15th July, 1870, (R. S., Sec. 1262,) must be allowed upon the '*current yearly pay*,' which, as the same was defined in Tyler's case, means the sum properly classed as salary plus the earned increments of longevity pay; or, to be more brief and exact, it means all the yearly pay the officer receives for the time being.

"By section 1274 the *basis* or *grade* pay, or, in the language of this statute, the pay of the rank, is upon transfer to the retired list reduced by twenty-five per centum, which fixes the salary or grade pay of retired officers at seventy-five per centum of the full salary as fixed by Section 1261.

"*Revised Statutes, Section* 1262:

"'There shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service.'

"This statute embraces *all* commissioned officers below the rank of brigadier general, and applies, *be it remembered*, to just such *yearly* pay as the officer was entitled to receive for the time being, and not, we insist, to any visionary pay which he might, per chance, have received had he remained on the active list. When the percentage increase upon the current yearly pay reaches, or equals, forty per centum of the pay of the grade it must stop.

"*Revised Statutes, Section* 1263:

"'The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.'

"*Revised Statutes, Section* 1267:

"'In no case shall the pay of a colonel exceed $4,500 a

year, or the pay of a lieutenant colonel exceed $4,000 a year.'

"Now, in order to bring the pay of retired colonels and lieutenant colonels in contact with this limitation upon the aggregate pay which officers of their rank on the active list shall receive, the Department has held that a method should be applied; that instead of computing the percentage increase upon the *current yearly pay*, as Section 1262 *commands* it *shall* be done, these officers are required to compute their percentage increase upon a *supposed sum*, which they do not receive, but which they possibly might have received had they not been retired, and then take seventy-five per centum of that sum, and by this purely *theoretical* manœuver the part pay of the retired colonel and lieutenant colonel is made to so far exceed its *real* proportions as to bring it in contact with the limit fixed upon the *full* pay of the colonel and lieutenant colonel upon the *active* list—a feat superhuman, supernatural.

"Now, when an officer is retired before he has served five years, as is sometimes the case with those who engage in Indian warfare, he receives, under Sec. 1274, R. S., just seventy-five per centum of the pay of the rank upon which he is retired; and when the first five-year term is completed, he is entitled to ten per cent. on that sum, and why? Because it is his *current* yearly pay. And after the second five-year term he is entitled to ten per cent. upon the sum which he received during the first five years, plus the ten per cent. which was earned and constituted a part of his current yearly pay during all of the second term of five years; and so on until the limit imposed by Sec. 1263, R. S., of forty per cent. on the pay of the grade, is reached. Now, if the pay of the *grade* referred to in Sec. 1263 is, with respect to *retired officers*, to be considered that pay which is specified in Sec. 1261, R. S., then we are content to go on adding ten per centum upon the *current* yearly pay for each lustrum until full forty per centum on the *active* grade pay is reached.

INCREASE UPON CURRENT YEARLY PAY STOPPED.

"After current yearly pay had been defined by the Supreme Court, in Tyler's case (15 Otto, p. 244), Congress wished to limit the increase for length of service to a percentage on the pay of the *grade* or *rank* instead of the *current yearly pay*, and it did so by the Act of June 30, 1882, (U. S. Stat., Vol. 22, p. 118,) in the following words: '*Provided*, that on and after the first day of July, 1882, the ten per cent. increase for length of service, allowed to certain officers by Section 1262 of the Revised Statutes, shall be computed upon the pay of the *grade* as fixed by Sections 1261 and 1274 of the Revised Statutes.

"Had the words '*and* 1274' been omitted from this proviso, which was calculated to stop the so called *compounding* of the percentage increase, retired officers must have computed their longevity pay upon the full grade pay of the active list as fixed by Section 1261, instead of the *reduced* grade pay.

"As a matter of fact, the words '*and* 1274' were inserted into this proviso as an amendment to the original bill, as the files show. This would indicate that Congress was not legislating blindly. There are two classes of pay, one pertaining solely to the *rank* or *grade*, and the other as exclusively to the *length of service*, and there is absolutely no reason for confounding one with the other.

"This proviso, be it remembered, does not presume to fix the pay of the *grade* of officers either on the active or retired list, but in plain and unpervertable terms declares that the percentage increase *shall* be computed upon the *grade* pay, as the same *is fixed* by sections 1261 and 1274, R. S.

"The object of this proviso was not to define these two sections, (1261 and 1274,) but to make the fixed pay of the *grade* the *basis* for computing the percentage increase, instead of the *current yearly pay*, which had been subject to change by the addition of the earned increments of longevity pay. Now, the accounting officers hold that these statutes

do not and never have fixed the pay of the grade of *retired* officers, and that the current yearly pay of *retired* officers is not limited to such *yearly* pay as they actually receive, but is some imaginary pay which they *do not* receive.

"The terms '*rank*' and '*grade*' must be regarded as synonymous with respect to officers' pay, as the following citations from the Revised Statutes amply show:

"Sec. 1205: 'A grade in his regiment "equal to the *grade*" of his commission.' Sec. 1206: 'Below the *rank* of field officer; promoted to a higher *grade*.' Sec. 1207; 'Promoted to the *rank* of captain; officers of the same *grade*.' Sec. 1208: '*Rank* of field officer; promoted to higher *grade*.' Sec. 1211: 'Brevet *rank*.' Sec. 1212: 'Actual *rank*.' Sec. 1217: 'Appointments to fill the *grades*.' Sec. 1226: 'Highest volunteer *rank*; uniform of highest *grade*.' Sec. 1256: 'Uniform of *rank*.' Sec. 1262: 'Below the *rank* of brigadier general; assimilated *rank*.' Sec. 1263: 'Yearly pay of *grade*.' Sec. 1270: 'Officer of same *grade*.' Sec. 1274: 'Pay of the *rank*.' Sec. 1275: 'Pay of highest rank.' Sec. 1310: 'Rank of colonel,' &c., &c."

"Although the Court of Claims decided this question against Colonel Roberts, (10 C. C., 283,) and has reaffirmed that opinion in this case, yet its discussion of the same questions in Tyler's case (16 C. C., 223,) seems to be quite consistent with the claims here so confidently urged.

"The following is from the opinion last alluded to:

"There remains one other question which, although of less importance than those we have been considering, has been raised, and we must therefore pass upon it. It relates to the manner of computing the ten per cent. longevity pay, and the meaning of the words 'current yearly pay' in Section 1262 of the Revised Statutes. The defendants insist that the current yearly pay is the fixed annual pay, without the addition for longevity. Thus the pay of a captain. not mounted, is by Section 1261 of the Revised Statutes, eighteen hundred dollars a year. For each term of five years'

service the defendants would add ten per cent. of that sum only—$180.

"That is a convenient method of calculation, since it avoids fractions of dollars, and may have been adopted by the pay officers for that reason, as it does not largely vary the result in any case, but it is not strictly accurate. 'Current yearly pay' implies a pay which is subject to change as the years run on. The expression is nowhere found in the Statutes except in this connection. *It evidently means ten per cent. of the whole pay the officer is receiving, or is entitled to ceive, at the time he becomes entitled to an increase of pay.*

"It is significant of the intention of Congress that in section 1263 the limitation of the total amount of increase for length of service is a percentage of forty per cent., not upon the 'current yearly pay,' upon which, by the next preceding section, the periodical increase is to be computed, but is upon the 'yearly pay of the grade,' thus making a distinctien between 'current yearly pay' and the unchanging 'yearly pay of the grade,' which we but adopt, and apply with mathematical precision."

"This only emphasizes the distinction between *rank* or *grade* pay and pay for length of service, and considering the two pays distinctively, as they must be considered, you have a fixed, tangible, certain *grade or basis* pay, upon which the pay for length of service *must* be computed and added. You cannot compute longevity pay upon a supposed pay which does not exist under the statutes. No one confused the pay *proper or grade* pay (under the old law) with the longevity or service *rations*. The pay proper pertained solely to the grade or rank, and the rations to length of service."

"In confirming the opinion just cited, the Supreme Court, 15 Otto, 244, in the last clause of its opinion, used the following language, *i. e.:*

"We also hold that the words 'current yearly pay,' in Section 1262, require that when the increased pay for any period of five years is to commence, the ten per centum must be counted on the regular salary added to its increase

by any previous periods of five years. So that the original salary of the rank, and any additions of ten per cent. previously earned for periods of five years, constitute the current yearly pay on which said ten per centum is to be calculated."

"The second paragraph of the syllabus is in words as follows, *i. e.:*

"The ten per centum is to be computed on the sum primarily fixed as such *reduced* pay, with the increase for each five years previously earned added to that sum, when its increase for any new period of five years is to be computed."

This is our argument in a nutshell. The writer of this syllabus fully comprehended the opinion of the Court, and in view of the decision of this Court in the Tyler case just alluded to, we should, perhaps, apologize for so much argument; but there has been a most flagrant misconstruction of the laws, to the great injury of a considerable number of highly intelligent and especially deserving citizens, and the *exigence* of their declining years demands that this high Court of *last resort* shall make no mistake in its interpretation of these statutes.

"There are but a few of these retired colonels and lieutenant colonels, and many of them have served through two wars; nearly all of them have been retired on account of age or wounds received in battle, and must soon respond to the last roll-call. While the civil war was raging the names of Doublebay, Granger, Hunter, Gregg, Reynolds, Smith, Swayne, Stoneman, Bomford, Graham, Casey, Hoffman, Burbank, Carrington, Woods, Oakes, Fry, Palmer, Hunt, Crittenden, and others for whom we are here pleading, were not unfamiliar to the average citizen. They were then in command of *divisions* and *corps* of the great volunteer armies, and upon *their* genius, skill, patriotism and valor, as much as upon that of the Commanding General, depended the fate of the Union. These allusions to past services are distasteful to the officers concerned; but as their retired pay is in the nature of *deferred compensation* for these

services, and since the impression prevails to some extent that retired officers are being *paid for 'doing nothing,'* or receiving a charity under the *guise* of *pay*, such allusions seem pardonable. The class of citizens here claiming are highly intelligent, and capable of construing *plain English*, and not one of them would claim that which he did not believe *justly* and *legally due him*. They do not complain of the laws, but of those public functionaries who habitually contrive to misconstrue the laws with respect to any compensation or allowance which Congress provides for them.

"What is the *retired* pay of a colonel that a comptroller, acting for a great Government like this, should esteem it his duty to "*lop it off*" or curtail it without regard to law or reason? And how does it compare with the competency acquired by men engaged in private pursuits, who in point of intelligence and capacity would stand upon a level with the successful commander of an army corps? The compensation of the general of the army is about twice that of a major general, and he is retired upon *full pay and allowances*, while the *major general* of *volunteers*, who commanded a corps, is relegated to his rank of *colonel* in the *regular army*, and retired upon three-fourths of the pay of that grade. Now, the general is not too well provided for; but, in view of the hazards and hardships of the service to which the lives of these officers have been subjected and unselfishly devoted, and the great importance of that service to the *fifty-five millions of people* who now enjoy its fruits, in the blessings of a *Union preserved* and a prosperity unequalled in the history of the civilized world, it may be *boldly* asserted that *full* pay *for life*, as is provided for the *General* and the *Judiciary*, would be a more fitting compensation for their services to the Government.

R. B. & C. G. WARDEN,
Attorneys for Appellants.

DEC 31 1887
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

EDWARD C. MARSHALL AND ROBERT CHAPIN, administrators of Elisha G. Marshall, deceased, APPELLANTS,
vs.
THE UNITED STATES.
No. 318.

APPEAL FROM THE COURT OF CLAIMS.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

EDWARD C. MARSHALL AND ROBERT CHAPIN, administrators of Elisha G. Marshall, deceased, APPELLANTS, *vs.* THE UNITED STATES. } No. 318.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF OF ARGUMENT FOR APPELLEE.

STATEMENT.

The administrators of Colonel Marshall claim that whilst he was a retired officer of the Army he was entitled to a larger amount of pay than he received.

The pay of a colonel of the Amy on the active-list is fixed by section 1261, Revised Statutes, at $3,500.

He is also entitled to an increase of 10 per cent. for every five years of service. Such increase not to be more than 40 per cent. and the maximum pay not to exceed $4,500.

The pay of a retired officer of the Army is fixed at 75 per cent. of the "pay of the rank upon which they are retired."

Colonel Marshall was paid 75 per cent. of the maximum pay allowed by law to an officer of his rank.

His administrators claim that the 75 per cent. should have been calculated on $3,500, plus 10 per cent. on each term of five years until the 40 per cent. limit, for the reason that by such calculation the full limit of $4,500 would not have been reached.

Claimants' estimates are as follows:

Colonels pay by section 1261	$3,500.00
Colonel's retired pay	2,625.00
After five years' service	2,887.00
After ten years' service	3,176.25
Afier fifteen years' service	3,493.87
After twenty years' service	3,675.00
Amount allowed by accounting officers and under decision of court:	
Colonel's maximum pay	4,500.00
Amount allowed 75 per centum	3,375.00

The difference, $300 per annum, is the subject of controversy.

The court below decided that the 75 per centum is to be calculated on the maximum pay of colonel.

BRIEF FOR APPELLEE.

Section 1274, Revised Statutes, is as follows:

> Officers retired from active service shall receive 75 per centum of the pay of the rank upon which they are retired.

Section 1261 fixes the pay of officers of the Army in active service.

Section 1274 fixes the compensation of officers wholly retired.

Claimants contend that the words "pay of the rank upon which they are retired" only refer to rank pay as fixed by section 1261.

Section 1262, Revised Statutes, provides that—

> There shall be allowed and paid to each commissioned officer below the rank of brigadier-general * * * 10 per centum of their current pay for each term of five years' service.

Section 1263 provides that the total amount of such increase for length of service shall in no case exceed 40 per cent. of their current yearly pay for the grade prescribed.

By section 1261, the pay of a colonel on the active list is fixed at $3,500 per annum.

Section 1267, Revised Statutes, provides that the pay of a colonel on the active list "shall not exceed four thousand five hundred dollars."

By calculation, the 40 per cent. added to the pay ($3,500) of a colonel on the active list would exceed $4,500.

By calculation, 40 per cent. of $3,500 added to 75 per cent. of $3,500 ($2,625) would not exceed $4,500.

Claimants contend that although by their estimate a retired colonel should receive more than 75 per cent. of the current pay of an officer of same length of service on the active list, he would be entitled thereto because the pay received by him would not exceed the maximum amount of $4,500.

As stated in the opinion of the court below:

> This contention has already been twice decided adversely to the claimants. (*Roberts* v. *The United States*, 10 C. Cls. R., 283; *Tyler* v. *The United States*, 16 C. Cls. R., 236.)

The facts in the Roberts Case presented the same issue as in the case at bar. B. S. Roberts, who had been in active service in the Army for 35 years, was placed upon the retired list with the rank of lieutenant-colonel. The pay of lieutenant-colonel was $3,000, with the allowance of 10 per cent., as above set forth; the maximum pay of a lieutenant-colonel being $4,000.

The position of claimant was that, although 40 per cent. of $3,000 added to that sum would amount to $4,200, and would therefore be $200 beyond the limit of a lieutenant-colonel's maximum pay, 75 per cent. of $4,200, would only be $3,150, and therefore within the limitation.

The court held "that retired officers are entitled to receive 75 per cent. of the whole pay which they were receiving as officers in active service when placed on the retired list, including their current yearly pay and the allowance for length of service, limited by the maximum fixed by said act, which in the case of a lieutenant-colonel is $4,000."

In the case of *Tyler* vs. *The United States* (16 C. Cls. R., 236) the main question presented was as to whether an officer of the Army on the retired list was in the service notwithstanding his retirement; but the point at issue in the Roberts Case (*supra*) was presented in argument, and relative thereto the chief justice, in delivering the opinion of the court, said: "We held then (in the Roberts Case) and we now hold, that the pay of a retired officer is to be

determined by first ascertaining what would have been his pay had he not been retired, and then allowing him 75 per cent. of that sum." Tyler's case (*supra*) was affirmed by this court on appeal. (105 U. S. R., 244.)

In claimants' brief it is admitted that both in the Roberts Case (*supra*) and the Tyler Case (*supra*), as well as in the present case, the opinion of the court below is adverse to his claim; but it is claimed that in all the cases referred to, the court was in error.

A distinction is attempted to be made between the rank or grade pay as established by section 1261 and the added longevity pay of 10 per cent. accruing under sections 1262, 1263, and 1267, Revised Statutes. It is asserted in claimants' brief (p. 5) "this section (1274) most clearly applies to the pay of the *rank or grade*, and not to the *current or full* pay an officer is receiving at the time of his retirement."

Such construction might be warranted under a literal interpretation of the words of the section. But if the interpretation claimed should be adopted, a different conclusion than that claimed in appellants' brief would follow.

Section 1274 fixes the pay of retired officers. They are to receive 75 per cent. of the pay of the rank upon which they are retired. If the "pay of the rank" means the pay as fixed by section 1261, then the pay of retired colonel of twenty years' service would be only 75 per cent. of $3,500, the grade pay, instead of 75 per cent. of $4,500, the grade and longevity pay.

But neither the accounting officers, the court below, nor this court have given the statute so narrow an interpretation. The longevity pay allowed is as much the "pay of the rank" as is the grade pay fixed by section 1261. Lon-